IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. .....

JOSEPH NISONOFF,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

The case involves rights guaranteed by the United States Constitution.

The question of confrontation which is involved in this case is guaranteed by the Sixth Amendment to the Constitution of the United States. This Court has frequently held that the right of confrontation, involving as it does the right of cross-examination, is a fundamental right. And in recent years this Court has frequently held that the fundamental rights guaranteed by the Sixth Amendment to persons accused of crime are guaranteed to persons accused of crime when tried in the state courts by the Due Process Clause of the Fourteenth Amendment.

Moore v. *Dempsey*, 261 U. S. 86;
Powell v. *Alabama*, 287 U. S. 45;

Brown v. *Mississippi*, 297 U. S. 278;
Chambers v. *Florida*, 309 U. S. 227;
White v. *Texas*, 310 U. S. 530;
Malinski v. *People*, U. S. , 89 L. Ed. Adv. Op. 738.

POINT II

The matter involved is of the highest public interest and importance.

Needless to say, also, the matter is of the greatest public interest and importance, since it involves the basic rights of every person in the United States accused of crime. Importance is added to the question by the fact that this is the first time, as far as we have been able to ascertain, that a question of this character has arisen in any court. The decision of the Court of Appeals of the State of New York is therefore likely to become the law of the land on a matter involving the Federal Constitution unless reversed by this Court. It is therefore of the greatest importance that this Court examine this question at this time in order to make sure that an erroneous construction of the United States Constitution on a matter of fundamental rights be not imbedded in our law by an accumulation of decisions in other courts, upon the authority of this decision, before this Court has passed upon the question.

POINT III

The document in question and the legal provisions under which it was prepared and kept.

Section 874 of the New York City Charter reads in part as follows:

"There shall be the office of chief medical examiner the head of which shall be the chief medical examiner

> who shall be appointed by the mayor from the classified civil service and be a doctor of medicine and a skilled pathologist and microscopist * * *."

Another section of the Charter provides for the appointment of Assistant Medical Examiners, who shall have the same qualifications as the Chief Medical Examiner. Both the Chief and the Assistant Medical Examiners are required to take the usual oath of office.

Section 1571-c of the Charter provides in part as follows:

> "It shall be the duty of the office of medical examiner to keep full and complete records. *Such records* shall be kept in the office, properly indexed, stating *the name,* if known, of every such person, *the place* where the body was found and *the date* of death. *To the record* of each case shall be *attached the original report* of the medical examiner and the detailed findings of the autopsy, if any. The office shall *promptly deliver* to the appropriate district attorney copies of all records relating to every death as to which there is, in the judgment of the medical examiner in charge, any evidence of criminality." (Emphasis supplied throughout unless otherwise stated.)

Section 879 of Chapter 39 of the New York City Charter provides:

> "It shall be the duty of the chief medical examiner to keep full and complete records in such form as may be provided by law. The chief medical examiner shall promptly deliver to the appropriate district attorney copies of all records relating to every death as to which there is, in the judgment of the medical examiner in charge, any indication of criminality, *and such records shall not be open to public inspection.*"

Section 878-3.0 of the Administrative Code of the City of New York provides:

> "If the cause of such death shall be established beyond a reasonable doubt, the medical examiner in charge

shall so report to his office. If, however, in the opinion of such medical examiner, an autopsy is necessary, the same shall be performed by a medical examiner. A detailed description of the findings written during the progress of such autopsy and the conclusions drawn therefrom shall thereupon be filed in his office."

The document in question was prepared in the presence of two police officers, and occupies more than three pages of the printed record. It is printed as Appendix B of this brief. As will be noticed upon examination, it is composed mainly of all kinds of expressions of opinion and estimates of size, measurements, color, texture, consistency, origin, etc. It fairly bristles with such terms and expressions as "natural", "normal", "loose", "firm", "soft", "faint", "moderate", "considerable", "readily", "irregular", "pale", "cloudy", "mangled", "congested", "dilated", "denuded", "distended", "fibroid", "necrotic", "*bile*-stained", "*blood*-tinged", "haemmorhagic fluid", "*surgical* incision", "*deeply* congested", "*markedly* oedematous", "*moderately* soft".

POINT IV

Judicial construction of the statutory provisions covering the document in question.

The New York Court of Appeals has held that although the office of Medical Examiner of the City of New York is a substitute for the ancient office of Coroner, the new office has none of the essential characteristics of the ancient office. *It is not a judicial office.* It is part of the investigating machinery set up in connection with the prosecution of crime,—its special function being to determine whether there is any evidence upon which to base a conclusion that a deceased has come to his death by criminal means.

"The duty of such chief medical examiner and his assistants is *to investigate* the circumstances of all

violent and suspicious deaths and to file a written report thereof in his office and to make autopsies if necessary * * * But the characteristic features of the office and power of a coroner (Code of Crim. Pro., Secs. 773-790) are not retained. The chief medical examiner acts without a jury, holds no inquest, renders no decision, holds no one to answer, issues no warrant of arrest. The ancient office is gone and the ancient duties have largely disappeared with it. *Another method of investigating suspicious deaths* has supplanted crowner's quest."

Matter of Senior v. *Boyle,* 221 N. Y. 414, 416-417.

The New York courts have also held that the autopsy report *is not a public record,* and cannot therefore be corrected or amended by an order of a court upon a showing of error in its contents.

"Sections 1571, 1571-a, 1571-b, 1571-c and 1571-d of the charter prescribe the procedure, duties and powers of the chief medical examiner in relation to violent and suspicious deaths * * *. The reports of the police department made by police officers are not public records. (Cit. cas.) * * * They are essentially confidential, relating to the apprehension and prosecution of criminals. *This also is true of the records of the office of the medical examiner.*"

Matter of Ziegler, 122 Misc. 351, 353.

Because of the fact that the Medical Examiner's office is considered part of the machinery of the prosecutor's office, the New York courts have held that the report of the Medical Examiner is not only not open to public inspection, *and that a person charged with crime has no right to examine the same, and that the courts have no power to direct its disclosure to counsel for the accused.*

People v. *English,* 175 Misc. 751;
Matter of English v. *Bohan,* 175 Misc. 930.

In the last case cited the Supreme Court of the State of New York said:

> "This petitioner seeks an order directing a judge of the Court of General Sessions to issue an order permitting the petitioner to inspect the autopsy record of the death of one Paul English * * *.
>
> The papers reveal that Novella English was indicted in the Court of General Sessions for manslaughter in the first degree for killing Paul English. Previously, *a motion was made for this basic relief in that court and denied.* That determination was adhered to upon motion for reargument * * *. The statute that is controlling is section 879 of the New York City Charter. Here we have a charge of the crime of manslaughter in the first degree. The chief medical examiner, pursuant to his duty, found evidence of criminality and delivered the autopsy record to the district attorney of New York county. *This statute says that 'such records shall not be open to public inspection'* * * * *It necessarily follows that the Court of General Sessions was correct in its ruling.*"

Matter of English v. *Bohan*, 175 Misc. 930, 931.

POINT V

The decision sought to be reviewed is clearly erroneous and in conflict with the decisions of this Court construing this provision of the United States Constitution as well as with the decisions of the English courts construing the same fundamental right under the common law.

A

The right of confrontation is a fundamental right of due process which exists independent of specific constitutional provisions

The right of confrontation, involving as it does the right of cross-examination, is one of the fundamental rights which existed at common law and still exists inde-

pendent of specific constitutional provisions. It existed in England and in this country prior to the adoption of the United States Constitution, and is still a part of the English common law as well as of the common law of every state of our Union. It is true, of course, as suggested by the New York Court of Appeals, that the various state legislatures would, but for the provisions of the United States Constitution, be free to infringe upon this right. But, we take it, that in the absence of specific legislative enactment changing the common law in this respect no state court would consider itself free to infringe upon this right, even in the absence of specific constitutional prohibitions. And the recent amendment to the New York Constitution shows that the people are alert to such possible infringements and intent upon the preservation of this right and its protection against infringement by either legislature or courts. Without inquiring into the question as to which branch of their government has brought the people of the State of New York to a realization of the danger, in so far as the omission in their own Constitution was concerned, it is sufficient to point to the fact that they have found it necessary or expedient to amend their Constitution in 1938 by inserting into that document the following provision:

> "No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of Congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation *and shall be confronted with the witnesses against him.*"

Indeed, neither the fundamental character of the right involved, nor of the necessity for care in its preservation, was denied by the New York Court of Appeals. Its decision proceeded upon the theory that the introduction of the document in question was permissible under the common law as it existed at the time of the adoption of the Sixth Amendment (in so far as the United States Constitution was involved) and was therefore not an infringement of the same. This claim is based on the assumption that the document in question was a "public record",—which is supposed to constitute an exception to the rule of confrontation at common law. But that assumption is clearly erroneous.

B

The right of confrontation is preserved by the Constitution to the full extent that it existed in England and in this country at the time of the adoption of the Constitution

In the leading case of *Mattox* v. *United States* (156 U. S. 409) this Court held that the protection of the constitutional provision of confrontation is secured to the people of the United States by the Sixth Amendment to the full extent that it existed in England and in this country at the time of the adoption of the Constitution. It is true that in that case the Court held that the constitutional provision is satisfied with *one full confrontation,* and a conviction at a second trial may be had without *further* confrontation, in a case where further confrontation is impossible; but, as the opinion of the Court shows, that was meant to be a modification of the rule, but its interpretation as it existed at the time of the adoption of the Constitution. That case involved the admission at a new trial of the sworn testimony of a witness at a former trial who had died in the meantime. In holding such testimony admissible, this Court assimilated the situation to the ancient exception in favor of dying declarations, which the law had always held a fair substitute for confronta-

tion, because of the consciousness in the dead witness' mind of his impending appearance before the Supreme Judge. The Court referred to the opinion of Chief Justice Fuller in delivering the opinion of this Court on an earlier appeal in the same case. On that occasion Mr. Chief Justice Fuller, speaking for a unanimous Court, said, in explaining the reason for the dying declaration rule as it existed at common law:

> "The point is to ascertain the state of the mind at the time the declarations were made. The admission of the testimony is justified upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood and enforce as strict adherence to the truth as the obligation of an oath could impose. But the evidence must be received with the utmost caution, and if the circumstances do not satisfactorily disclose that the awful and solemn situation in which he is placed is realized by the dying man because of the hope of recovery, it ought to be rejected."
>
> *Mattox* v. *United States*, 146 U. S. 918, 922.

And in giving the reasons for its decision in the second *Mattox* case this Court said:

> "Upon the trial it was shown by the government that two of its witnesses on the former trial, namely, Thomas Whitman and George Thornton, had since died, whereupon a transcribed copy of the reporter's stenographic notes of their testimony upon such trial, supported by his testimony that it was correct, was admitted to be read in evidence. Both these witnesses were present and were fully examined and cross-examined on the former trial. It is claimed, however, that the constitutional provision that the accused shall 'be confronted with the witnesses against him' was infringed, by permitting the testimony of witnesses sworn upon the former trial to be read against him. No question is made that this may not be done in a civil case, but it is insisted that the reasons of convenience and necessity which excuse a departure from

the ordinary course of procedure in civil cases cannot override the constitutional provision in question * * *.

The rule in England, however, is clearly the other way (cit. cas.). As to the practice in this country, we know of none of the states in which such testimony is now held to be inadmissible * * *. In the case of *State* v. *Campbell*, 1 Rich, L. 124, *the testimony of a deceased witness had been taken before a coroner, but in the absence of the accused, and of course it was held to be inadmissible.*

Upon the other hand, the authority in favor of the admissibility of such testimony, where the defendant was present either at the examination of the deceased witness before a committing magistrate, or upon a former trial of the same case, is overwhelming * * * The subject was also treated at great length by Judge Drummond in *United States* v. *Macomb*, 5 McLean 286, and the substance of a deceased witness' testimony given at a preliminary examination held to be admissible. All the cases up to that time were cited in the opinion, and the decision put upon the ground that, *the right of cross-examination having once been exercised, it was no hardship upon the defendant to allow the testimony of the deceased witness to be read* * * *.

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection * * *.

We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted,

not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a bill of rights are subject to exceptions, recognized long before the adoption of the Constitution, *and not interfering at all with its spirit.* Such exceptions were obviously intended to be respected. * * *.

The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. *This, the law says, he shall under no circumstances be deprived of* * * *."

Mattox v. *United States,* 156 U. S. 237, 240-244.

C

There is no exception to the rule of confrontation in favor of the admissibility of public records

The decision of the New York Court of Appeals proceeds upon the theory that there was at common law an exception to the rule of confrontation in favor of the admissibility of public records, and that the document here in question was a "public record". We shall see further below that under no possible theory can the document in question be considered a public record. But at this point we desire to respectfully suggest that the only exception to the confrontation rule known to the common law was that of dying declarations. There was no such exception at common law, as far as we are aware, in favor of public records. We have been able to find no English case in which such an exception to the rule of confrontation is recognized. Nor have we been able to find a case in this country, in which it was held that there was such an exception to the rule of confrontation at common law, either in England or in this country, at the time of the adoption of the United States Constitution.

D

The document in question is not recognized as a public record by the laws of the State of New York and has none of the essentials of a public record

(1) *Neither the statute itself nor the decisions of the Court dealing directly with the subject recognized the document as a public record.*

The first thing to be noted about the document is that the statute under which it was prepared *does not recognize it as a public record.* An examination of Section 1571-c of the Greater New York Charter quoted above will disclose that the statute itself pointedly differentiates between the "records" which it provides *should be kept* and the report of the Medical Examiner which is to be transmitted to the District Attorney. The "records" to be kept, says the statute, must contain the *name* of the deceased, the *place* where the body was found and the *date* of death. That is all the "record" that the law provides should be made and kept by the Medical Examiner's office. It then proceeds to say that "to the record of each case" "shall be attached" the original report of the Medical Examiner and the detailed findings of the autopsy, if any. It is thus clear that the statute provides for two things: A "record" limited by the statute itself to what such records usually contain—namely, name, date and place. And a Medical Examiner's "report" is no part of the "record". The "report" not being part of the "record", is, therefore, to be "attached to" the copy of the "record" when the same is transmitted to the District Attorney. It is because of these provisions, as well as the provisions for secrecy, that the courts of the State of New York have held, in all the cases in which the question was directly involved, that the Medical Examiner's report is not a "public record".

People v. *English*, 175 Misc. 751;
Matter of English v. *Bohan*, 175 Misc. 930;
Matter of Ziegler, 122 Misc. 351.

(2) *An examination of the common law as revealed by the adjudicated cases in England and in this country as to the state of the law at the time of the adoption of the Sixth Amendment shows that in order to constitute a "public record" within the exception to the hearsay rule, the document had to answer a three-fold test, in addition to being made by a public functionary in the discharge of a public duty:* (*a*) *the purpose had to be that of making a permanent record for future reference;* (*b*) *it had to be open for public inspection; and* (*c*) *it had to be in the nature of a registry of facts in themselves of a neutral character, in the sense that it had no other interest to the recording official than that of making a record of public events, such as births, deaths or marriages, recorded serially.*

(a) The common law as it existed in England at the time of the adoption of the Constitution, *and as it is still enforced by the courts of England today,* was thus stated by Lord Blackburn and Lord Watson in the much-cited case of *Sturla* v. *Freccia* (5 App. Cas. 623), decided by the House of Lords in 1845:

> "Lord Blackburn: I think as far as my recollection goes, although I will not pledge myself to its accuracy, and so far as I have ever heard anything cited, it will be found that, in every case in which a public document of that sort has been admitted, it has been made originally *with the intent that it should be retained and kept as a register referred to, ever after.*"
>
> "Lord Watson: My Lords, I cannot conceive when you take these circumstances into consideration along with the undoubted fact that this was not made for the purpose of being recorded in a public register that it can have the authority of a public register. No doubt the document survives, but the mere fact that a document intended for a temporary purpose of this kind, is found, after a long lapse of years in the archives of a Government office, does not constitute it of the authority of *a register.* The purpose of this document was ephemeral, and was at an end the moment the appointment was made."

And Lord Blackburn, after stating that a document, in order to be admissible as a "public record" within the exception to the hearsay rule, must be intended to "be retained and kept as a register referred to, ever after", proceeded to state in so many words that a temporary and confidential report, even though made on the highest authority, thus importing absolute verity, was not within that exception. Said he:

> "Supposing"—said Lord Blackburn—"this inquiry had been carried on under the authority of the English Crown, and the English Crown had required of a magistrate that some confidential report should be made, it is not to be public in one sense, but it would be public in this sense, that it would concern the Crown, and, from common respect for the Crown, one would suppose that what the magistrates told the Queen would be what they firmly believed and considered they had good reasons for believing, but I do not think it would come within the sense and meaning of the rule that a public document would be admissible as evidence on the ground that a public officer, in making the statement for the public, was likely to speak the truth and must be presumed, *prima facie*, to have known and to have spoken the truth. *I am not aware of any decision which says that, in such a case as I have supposed, the document would be received. I do not believe anyone has ever tried to put in such a document and therefore I do not think there is or can be any authority to the contrary.*"

What Lord Blackburn said with respect to the condition of the adjudicated cases in England in his time is also true of the state of the adjudicated cases in this country at that time. It will, we take it, be conceded that that is still the law in England, exactly one hundred years after the *Sturla* case was decided. It is claimed, however, that the rule has been changed by later decisions in this country. It is unnecessary to enter here upon a long inquiry as to whether that contention is true,—although we are confident that an examination of the cases in this country which are

usually referred to in this connection will not bear out the contention sufficiently to affect the present case, even if it were a civil suit in which the only question involved were the state of the law with respect to the hearsay rule. Such examination is not necessary because, concededly, the inquiry here is not whether the courts of this country have recently seen fit to modify the common law with respect to the hearsay rule, but whether such a modification of the hearsay rule derogates from the constitutional guarantee of confrontation. The condition of the common law of this country as late as 1858 was thus stated by the Supreme Court of New Hampshire:

> "*Official registers*, or books kept by persons in public office, in which they are required to write down particular transactions, or to enroll or record particular contracts or instruments, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth—the obligation of an oath and the power of cross-examining the persons on whose authority their proof and authenticity may depend. *This has been said to be, because they are required by law to be kept, because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office or in the discharge of an official duty.*"
>
> *Ferguson* v. *Clifford*, 37 N. H. 86, 95.

Bouvier's Law Dictionary defines "record" as a "written *memorial* made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said or done." But not only does the meaning of the word "record" import permanency in the sense of being a "memorial". It had also to be part of a *series* of entries made in the usual course of official business,—and the fact of its being part of a series was one of the elements which insured its correctness, as distinguished from something made *ad hoc*. That the word "records" is intended to apply only to a series of entries,

as contrasted with some "memorandum" made *ad hoc,* is clear from all the cases dealing with the subject of the hearsay rule. It is also clear from cases in other fields. So it was held in a recent case that there is a clear distinction between "records" and "documents", and that where a statute gave the right of inspection of the one it did not include the inspection of the other. In that case a Federal statute gave the Federal Trade Commission the right to inspect "documents, papers and correspondence", and the Court held that "documents" did not include "records". In the course of its opinion the Court said:

> "Generally speaking, the words 'documents' and 'papers' refer to particular instruments and writings bearing upon specific transactions, as deeds, contracts, plans, specifications, instruments, and writings generally of that nature, whereas 'books of accounts' and 'records' have reference to *serial,* continuous and more permanent *memorials of a concern's business and affairs, chronologically and systematically kept and arranged.*"
>
> *Cudahy Packing Co.* v. *United States,* 15 F. (2d) 133, 135-136.

It is thus clear that the first requisite of a "public record" is that it should be *a record,*—i.e., *something intended to be kept for future general reference,* and not something prepared for a temporary, special or an "ephemeral" purpose, the use of which ends with the matter immediately in hand.

(b) The same cases clearly demonstrate that in addition to its being a "record", intended for permanent reference, it must also be "public", in the sense that it was intended for *public use* and therefore *accessible to the public,*—so that those who are interested may consult it. As Lord Blackburn said: "• • • *so that the persons concerned in it may have access to it afterwards.*"

That the right of inspection was an essential prerequisite of a public document being a "record" is shown by the following comment in Bouvier's Law Dictionary:

> "At common law, there was no general right of inspection, but the right depended entirely upon the question whether the party seeking to exercise it had an interest. *If he had, he was entitled to exercise the right* upon the payment of the usual fees; but a mere stranger who had no such interest had no right of inspection at common law * * *. At a comparatively early period, this distinction between those who had and those who had not an interest became obliterated. The effect of modern recording acts making the public records notice, has aided to accomplish this result, and, *indeed, makes the right of inspection and of enforcing the privilege an essential one.*"
>
> Bouvier, Law Dictionary, article "Record".

(c) A further examination of the cases in both England and this country will disclose the fact that, at least until a very recent date, a public document had to be of a particular character in order to qualify as a "public record" within the exception to the hearsay rule,—namely, *that it had to be of events of more or less public notoriety, such as births, deaths and marriages.* And, by the same token, the events had to be of a *neutral character* as far as the official making the entry was concerned. The official keeping the record was entering a matter of common knowledge concerning *other people* in a matter in which he himself was not immediately concerned,—he was not recording his own birth or his own marriage, nor, of course, his own death. In short, it had to be, in the language of the New Hampshire case, in the nature of an *"official register"*,—particularly, *not something done with a special purpose in mind.*

Before the modern recording statutes, such registers were strictly limited to matters which were, in the language of the same case, of "public interest and notoriety", at least in their own community. This gave them additional

weight as sources of truthful information, because, as many of the cases point out,—since these matters were of common knowledge and the books were open to public inspection,—any error in the original entry was sure to be subsequently corrected. Our recording statutes have increased the number of things that can be entered upon a "register"; but their admissibility as evidence is strictly a creature of statute and limited to statutory purposes,—which, of course, relate solely to civil suits. Their principal effect is that of constructive public notice which brings them within the reason of the original rule which made public records an exception to the hearsay rule. Of course, even the limited efficacy of such "record" is circumscribed by many statutory provisions intended to safeguard their veracity. And, of course, they have no efficacy whatever in case their fraudulent character can be proven.

E

The modern enlargements of the exception of the hearsay rule refer only to matters the falsity of which could be proved

We further respectfully submit that a careful examination of the modern enlargements of the exception to the hearsay rule in favor of public documents, whether by statute or by judicial innovation, are limited to cases in which the document, if false, is susceptible of contradiction and therefore to disproof. The statutes and decisions therefore limit the enlargement of the exception to making the documents only *prima facie* evidence. But the limitation of *prima facie* is utterly inapplicable to a case like *an autopsy performed in secret,* such as that involved in the case at bar. A suit may, of course, always be lost because of inability to produce evidence to offset erroneous or false testimony. *But in this case the person affected was barred from obtaining any evidence of the event.*

The law under which the autopsy was held and the document prepared excluded him from viewing the "documented" event, and even from inspecting the document itself, or from correcting an error if by chance it should become known to him.

We respectfully submit that such a document would not be permitted in a civil suit under any "enlargement" of the exception to the hearsay rule. *It certainly cannot be permitted in the face of the constitutional guarantee of confrontation in a case in which there never was an opportunity for cross-examination,—an essential requirement of due process in every civilized community.*

F

Reports of coroners' inquests have always been excluded as hearsay

The reports of coroners' inquests have concededly been held to be hearsay, and excluded as such when an attempt was made to introduce them. This notwithstanding the fact that coroners performed judicial functions, and the coroner's inquest was a judicial proceeding. The reason is obvious: Even under the old coroner's procedure, the proceeding was sometimes *ex parte,* and where the defendant was present he did not have all of the rights and privileges usually accorded to an accused in a criminal prosecution. The report of the coroner was not a "public record" as understood at common law, the coroner being part of the prosecuting machinery of the state.

Prosecuting officials act, of course, under oath. But that does not mean that District Attorneys or other officials concerned in the prosecution enjoy special privileges with respect to their private findings or decisions. Indeed, notwithstanding their official oath of office, they frequently act in a partisan manner and their testimony should be specially scrutinized. They are frequently carried away by their zeal to do things which the courts have held not in consonance with their official duties, as the reports of

adjudicated cases show. And it so happens that the reported cases of the State of New York contain a case where a coroner was convicted of the crime of bribery in connection with his official judicial duties as coroner.

People v. *Jackson,* 191 N. Y. 292.

This does not, of course, indicate that coroners are particularly given to violating their oath of office. But it shows that the matters coming before them, and their successors the medical examiners, *are not of the kind in which reliance can be had on the oath of office alone.*

This is particularly true of an autopsy conducted under legal provisions such as obtain in New York City, in which, from the nature of the case, *a false or erroneous finding could not possibly be detected or contradicted.*

G

The enlargement of the exception to the hearsay rule in favor of public documents has never been held to extend to matters involving judgment, skill or accuracy of perception

We further respectfully submit that there is no case to be found in which the "enlarged" exception to the hearsay rule in favor of public documents has ever been applied, even in a civil case, to matters involving judgment, skill or accuracy of perception. And all sound reasoning is against it. Even Professor Wigmore, whose antipathy to the hearsay rule is well known, has never advocated such "enlargement". We are not speaking, of course, of cases where the official judgment itself is a matter to be proven. Coroner Jackson's judgment or decision in the inquest conducted by him could, of course, be proven when he was prosecuted for bribery in making that judgment or decision.

The only case in the Federal courts which has been called to our attention (*Heike* v. *United States,* 192 Fed. Rep.

83) in which a "public record", other than that of such matters of "public notoriety" as births, deaths and marriages was admitted in evidence, was that of a public weigher. Aside, therefore, from the other factors in that case which differentiate it from our case,—such as that the weigher was not part of the prosecuting machinery and the matter was of complete indifference to him, and the weighing was done in public and in the presence of the representative of the accused,—the matter involved was one of mechanical measurement which did not require any particular skill or accuracy of perception. Nor, of course, did it involve any judgment as to origin or cause and effect. The same is true of the *Slavski* case, heavily relied on by the New York Court of Appeals. This matter can therefore be best discussed in connection with that case, to the examination of which we shall now proceed.

POINT IV

The *Slavski* case furnishes no authority for the decision sought to be reviewed.

Before examining the case itself it should be noted that the *Slavski* case was decided largely on the authority of Mr. Wigmore's opinion that the rule as enforced in England was unsound, and that the modern tendency in the courts of this country was to get away from it. We have already indicated that Mr. Wigmore's opinion with respect to the current of decisions in this country is more in the nature of a wish than a fulfillment. However, this is immaterial in the present case, since Mr. Wigmore nowhere suggests that the kind of document with which we are dealing here would be admissible even in a civil suit, and the *Slavski* case itself does not so hold.

The *Slavski* case was a prosecution under a state law dealing with the traffic in intoxicating liquors. The state statutes provided that when intoxicating liquors are con-

fiscated under the law a sample should be sent to a laboratory conducted by the Department of Public Health, as part of its general business of taking care of the health of the community, for analysis and certification as to alcoholic content; and the question in the case was whether the admission of such certificate, under a statutory provision which made it admissible as *prima facie* evidence, violated the constitutional guarantee of confrontation. The decision was that the confrontation rule was not thereby violated. At this point we are not concerned in the question whether that decision was sound or unsound, but with an analysis of its meaning and the extent to which it went in departing from settled rules as to the constitutional guarantee involved.

That its decision was a departure from settled notions on the subject is conceded by the Court making the decision. But the Court justified its decision on the theory that it did not in fact violate any rule flowing from the basic ideas underlying the constitutional guarantee. In doing so the Court did not discuss the well-settled distinction between "records" and "documents", but rather proceeded upon the theory that the two are convertible terms. It then suggested that the legislature, in providing that the certificate should be made and that it could be used in evidence, was really *protecting the interests of the accused* as much as those of the public, by providing for a scientific test by a *disinterested agency, not part of the prosecuting machinery,*—the analysis being at the disposal of the accused as well as of the prosecution.

The document in question was a "public" one, at least in the sense that it was made for the use of all those who may be concerned or have an interest therein. And it met the requirement that it should be made by a person entirely disinterested in the matter. It offended the requirement of seriality and was made *ad hoc*. But the Court met that partly by the suggestion that it was made for the defendant's own benefit and partly pointing to the nature of the matter itself,—namely, *that it did not involve anything*

dependent on opinion, judgment, or quickness of perception. Said the Court:

"One of the acknowledged exceptions to the face to face rule of evidence is that public records are competent evidence with all probative value respecting an issuable fact. That is an essential principle of the common law recognized at the time of the adoption of the Constitution. It cannot be thought that the Constitution was intended to close the door to the legislative department of the government to establish new public records with like probative value. Existing public records did not become rigid for all time for evidential purposes. Power to add to the varieties of public records under the principles of law prevailing at the time of the adoption of the Constitution is conferred on the General Court under the grant to make, ordain and establish all manner of wholesome and reasonable laws not repugnant to the Constitution. There is analogy in this respect to the trial by jury preserved in all its essentials by the Constitution, which may be regulated by the legislature as to details not impairing its essential integrity * * *.

The principle which seems fairly deducible from them (the decisions) is that a record of *a primary fact,* made by a public officer in the performance of an official duty is or may be made by legislation *prima facie* evidence as to the existence of that fact, but that records of *investigations and inquiries* conducted, either voluntarily or pursuant to requirement of law, by public officers *concerning causes and effects involving the exercise of judgment and discretion, expressions of opinion,* and making conclusions are not admissible in evidence as public records. * * *

The determination of the percentage of alcohol in liquor at a specified temperature is the ascertainment of a fact by well recognized scientific processes. *Chemical action* and measurement in such an analysis *do not depend in general upon the quickness of apprehension,* retentiveness of memory, temperament, surmises or conjectures, of the individual. The admission in evidence of the record of such a fact made by a public officer pursuant to statutory obligation would be as likely to be correct as many of the public records

> which have been held to be admissible. There would seem to be as little likelihood of variation of result in such an analysis between different chemists as in the observation of the weather, enumeration of proprietors, or the notation of the weights on scales by other classes of public officers. *The General Court may have felt that it was wise and just with reference to owners of liquor and prospective defendants,* as well as to the general public, to provide for *an impartial analysis by a public officer* in order that the fact of alcoholic content in liquor seized might be established according to *a scientific standard in which confidence might be reposed.*"
>
> *Commonwealth* v. *Slavski,* 245 Mass. 405, 417.

To this should be added the fact that in this case, as in all other cases in which such documents were admitted in evidence, the document was admitted merely as *prima facie* evidence, *and that the conditions were such as would* permit contradiction if it were false. The owner of the liquor knew all about its composition at the time of its confiscation, and so did probably all of his employees. Also, although the opinion in the case does not mention the fact, the liquor itself was probably available and could be produced at the trial, thus furnishing the chance of contradiction of a false certificate, or the correction of an erroneous one. And the owner of the liquor had, of course, an opportunity to take a sample of the same at the time of confiscation and have it analyzed by a laboratory of his own choosing so as to furnish other evidence as well as a basis for checking the correctness of the analysis made by the laboratory of the Department of Public Health. It is because of this situation that the Court assumed that the legislative intent was to protect the owner of the liquor as well as the public in providing for this *impartial* analysis. The thought behind this statement of the Court apparently being that otherwise the jury might possibly be confronted with two contradictory analyses coming from the *interested parties,*—the prosecution on the one hand

and the defense on the other. Clearly, the situation is of an utterly different kind and character from that presented in the case at bar,—where the autopsy was made by a person who was part of the prosecuting machinery, in secret, without the presence of the accused or his representative, *and in a situation where there was no possible way of correcting error or disproving falsehood.*

POINT V

The *Slavski* case is a warning.

The *Slavski* case is clearly no authority for the decision sought to be reviewed; *and there is no other authority for it.* Indeed, *it is contrary to authority as well as our basic conceptions of justice.* It puts a person accused of crime in a position of utter helplessness against a false or erroneous accusation by depriving him of the only means of exposing falsehood and dispelling error, *that of cross-examination.*

But the *Slavski* case should serve as a warning against the departure from those well-tried safeguards which the Constitution throws around persons accused of crime. Let us recapitulate the history of the breakdown of a fundamental constitutional guarantee:

Mr. Wigmore doesn't like the hearsay rule, believing it to be too technical in some of its aspects. He therefore says that certain well known exceptions to the rule ought to be "enlarged"—without, of course, destroying its basic essentials. He also says that there should be no difference in this respect between ordinary rules of evidence which are always subject to change by legislation, and are occasionally changed by the courts, and the constitutional guarantee of confrontation. "Progressive" courts, impatient of technicalities, accept his views in civil cases. Then the decisions in these cases are cited in criminal cases, as if there were no difference between ordinary rules of evi-

dence and constitutional guarantees. A "progressive" court thereupon decides in a comparatively unimportant criminal case that a certificate stating the result of a chemical analysis *probably* intended for the protection of the accused, as well as that of the public, should be admitted in evidence, notwithstanding the confrontation guarantee, because it contains the results of a scientific analysis as to which there could be no differences of opinion, and was made under circumstances in which the rights of the accused were fully protected against error or falsehood. Then comes another court and says that the path of "progress" did not stop with the *Slavski* case: That since the *Slavski* case had held that the constitutional guarantee is no better than an ordinary rule of evidence, the certificate of a Medical Examiner stating the alleged results of an autopsy performed by him in secret, is admissible even though it contains all manner of opinion and is not subject to any scientific test, and renders the accused helpless against error or falsehood.

If anyone who did not give careful thought to the subject were asked whether there was any rational reason for excluding the certificate involved in the *Slavski* case, aside from the constitutional guarantee, one would probably say that there wasn't any. Mr. Slavski probably knew all about the composition of the liquor that he manufactured or sold; was certainly in as good a position as the prosecution for a sample analysis; the analysis was made by an impartial agency, and was of a matter upon which there can be no difference of opinion between honest chemists. Mr. Slavski's interests were not really endangered thereby. The hearsay rule as applicable to this situation was therefore technical. And if it be true that the guarantee of confrontation was only intended to canonize the hearsay rule, we ought to disregard it as "technical". But this disregard of a "technical" aspect of the constitutional guarantee in the *Slavski* case has led to its complete abrogation in the *Nisonoff* case. We need not discuss the question whether

the guarantee must be preserved in all its technical aspects, —for this case involves the essentials of the constitutional guarantee. But the *Slavski* case may stand as a warning against light-hearted infringements of, or encroachments upon, constitutional guarantees. We venture to suggest that the integrity of our constitutional system would have been better served if the *Slavski* certificate had not been admitted. But be that as it may, it is clear that the breach made by the *Slavski* case in the fundamental constitutional guarantee involved must not be permitted to be widened.

CONCLUSION

We respectfully submit that this is a case eminently proper for this Honorable Court to review, so that the serious breach in the constitutional guarantee effected by this case may not remain permanent, and itself serve as a basis for further breaches.

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Respectfully submitted,

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